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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 771

STANLEY G. KLUMB,

Petitioner,

vs.

JOHN ROACH AND EDWIN B. H. TOWER, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Stanley G. Klumb, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review an opinion of that court filed on October 26, 1945.

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This suit was brought by the plaintiff Klumb under R.S. Sec. 4915 (Title 35 U.S.C.A. Sec. 63) to obtain a patent over the decision of the patent office in an interference proceeding, *Roach v. Klumb,* No. 75,368.

In the Patent Office both the Examiner of Interferences and the Board of Appeals[1] awarded priority of invention to the defendant Roach. The complaint in this suit was thereupon filed in the District Court of the Eastern District of Wisconsin on April 4, 1941, within six (6) months of the decision of the Board of Appeals (R. p. 2).

There was a recorded assignment of a one half (½) interest to the defendant Tower in and to the patent rights claimed by the defendant Roach.

But because Tower had been the attorney for Roach during the proceedings in the case, both in the Patent Office and subsequently, he was inadvertently not made a party defendant to the action, Roach being the only defendant named in the complaint as originally filed.

On April 10, 1943, after a trial on the merits of the case, the District Court rendered an opinion in favor of the plaintiff Klumb adjudicating him the first inventor of the subject matter in issue (R. p. 451). Four days after the court had rendered this opinion, and before judgment was entered, respondent Tower sent a letter to the Commissioner of Patents requesting that the Commissioner disregard Tower's previous request for three months' deferment in the issuance of Letters Patent to Roach and that such Letters Patent be issued forthwith (R. p. 166, 478). The patent, No. 2,318,832, was issued May 11, 1943 (R. p. 168, 479).

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[1]The interference proceeding was brought under R.S. Sec. 4915, prior to the amendment of Aug. 5, 1939. Sec. 5 of that Act, 53 Stat. 1212 says: "This Act shall take effect two months after its approval; but it shall not affect interferences then pending, which may be heard and decided and appeals and other proceedings taken under the statutes in force at the time of approval of this Act as if such statutes had not been amended."

Because of the issuance of the patent, No. 2,318,832, plaintiff, on June 5, 1943, before the rendering of final judgment, filed a motion to reopen the case for the purposes of: (1) making Tower a party defendant thereto by amending the complaint, (2) introducing in evidence the letter from Tower to the Commission of Patents, and (3) introducing in evidence a copy of Letters Patent No. 2,318,832 (R. p. 455).

Plaintiff's motion was granted, and Tower was accordingly made a defendant in the action. (R. p. 457).

Tower did not raise the defense of want of jurisdiction as to his person either at this time or subsequently. During the hearing on the amendment to the complaint Tower pointed out to the Court that his interest in the invention was disclosed by the file wrapper introduced in the trial against Roach. The following colloquy then took place (R. p. 169):

> "The Court: Did you call it to the court's attention?
>
> "Mr. Tower: I didn't have the time. That wasn't the point of this case. I wasn't bringing the suit. The other side was bringing the suit and it was up to them to plead the parties they want to make to the suit. You had jurisdiction of one party. You didn't have to have me here to determine the issue involved on the 4915. The fact is: I didn't have to appear at all."

Defendant Tower then moved for leave to file an answer to the original complaint and to introduce evidence upon the defenses pleaded in said answer (R. p. 463). The court in denying this motion found that "an examination of said proposed answer demonstrates that said defendant Tower desires to have a trial not only upon

the issues heretofore passed on by the court, but also various other issues which the said Tower could have raised at the trial in behalf of his client, Roach, but which he failed to do." (R. p. 467).

Subsequently, the Court awarded final judgment to the plaintiff Klumb against defendants Roach and Tower. (R. p. 480).

Upon appeal, the defendants moved that the judgment awarded by the District Court be reversed and the suit dismissed (R. p. 515) for want of jurisdiction. As a basis for such motion they argued, for the first time, that the plaintiff had failed to file a complaint and prosecute the suit against all the adverse and indispensable parties within the period prescribed by the section upon which the action was predicated.

So far as it is pertinent, Sec. 4915 R.S. reads as follows:

> "Whenever a patent on application is refused by the Board of Appeals, or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six (6) months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear."

In its opinion[1] the Circuit Court of Appeals for the Seventh Circuit sustained the position of the defendant

[1] The opinion of the Circuit Court of Appeals in nowise controverted the District Court's finding that Klumb was the first inventor.

Tower as to the issue of jurisdiction on the theory that Sec. 4915 requires that all adverse parties be made defendants to an action under that section within six (6) months after the refusal or decision of the Board of Appeals.

Petitioner contends that the phrase "may have remedy by bill in equity if filed within six (6) months after such refusal or decision" in Sec. 4915 means that the bill, that is to say the complaint, must be filed within that time and that it is not necessary that the Court have jurisdiction over all of the parties within the six (6) months period.

QUESTION PRESENTED

The sole question presented for the consideration of this Court, therefore, is whether, under the facts in this case, the District Court had jurisdiction to issue a judgment binding on both defendants under Sec. 4915 R.S.

REASONS FOR GRANTING THE WRIT

Your petitioner respectfully prays that the Writ be allowed for the following reasons:

1. The decision of the Court of Appeals is in conflict with the express provisions of U.S. Code Title 35 Sec. 63 (Sec. 4915 R.S.).

2. The decision of the Court of Appeals for the Seventh Circuit is in conflict with decisions of the Circuit Courts of Appeals for other Circuits and with decisions of this Court.

It has repeatedly been held that an action under a statute of limitations need only be *commenced* within the statutory period and that it is not necessary for the Court to

have *acquired jurisdiction* over the parties to such actions within the period of statutory limitation. Further, it has been held by this Court that the complaint may be amended after the statutory period has run without imperilling the plaintiff's action so long as the complaint itself is timely filed, and even, in the case of *Missouri, Kansas and Texas Railroad Company v. Wulf,* 226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355, that the plaintiff may sue in a new capacity and under a new statute after the statutory period has expired, as long as the original complaint has been filed within the time allowed.

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal Law which has not been, but should be, decided by this Court. By its opinion, the Circuit Court has held in effect that an attorney who litigates a case from its commencement until judgment is awarded does not stand in such a relation of privity to his client that the defenses which he has pleaded and the evidence which he has introduced therein are binding upon him in the judgment in the action.

The question for decision of this Court, therefore, is whether due process of law has been had against an attorney in such a case.

4. The importance of this case to large numbers of farmers as well as to the entire electric fence industry affords reason for the exercise of this Court's discretion to grant the writ.

In its decision upon the merits of the case the District Court held that the plaintiff Klumb is entitled to a patent on the subject matter in issue, hence, the Roach patent, issued after the District Court announced its decision, is invalid. It can therefore, afford no protection to those whose rights are founded upon it; and while Klumb has

been adjudged the prior inventor by the judgment entered upon a trial on the merits by the District Court, Klumb, nevertheless, is unable to assert his rights to the invention, or to protect those who have taken under his claims, because of the decision of the Circuit Court of Appeals.

This presents a situation in which a large element of the American public has an immediate interest in affording to the Petitioner the protection of his rights which has been denied by the decision of the Circuit Court. It is, therefore, such a case as comes within the discretionary powers of this Court as established by *De Forest Radio Co. v. General Electric Co.*, 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.*, 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; and *Altoona Publix Theaters, Inc. v. American Tri-Ergon Corp. et al.*, 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

IRA MILTON JONES
Counsel for Petitioner
STANLEY G. KLUMB

Milwaukee, Wisconsin
January 21, 1946

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below.

The opinion of the District Court (R. p. 451) is not reported.

The opinion of the Court of Appeals (R. p. 518) is reported in 151 F. 2d 374.

Jurisdiction.

The date of the judgment is July 16, 1943. The statute under which jurisdiction is invoked is Section 240 (a) Judicial Code (28 U.S.C.A. Sec. 347 (a)), as amended. Cases believed to sustain the jurisdiction are: *De Forest Radio Company v. General Electric Company,* 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.,* 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; *Altoona Publix Theatres, Inc. v. American Tri-Ergon Corp. et al.,* 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005; and *Muncie Gear Works, Inc. et al. v. Outboard Marine & Mfg. Co. et al.,* 315 U.S. 759, 62 S.Ct. 865, 86 L.Ed. 1171.

Statement.

The facts so far as this application is concerned are sufficiently stated in the petition.

Specification of Errors.

The error which petitioner will urge if the Writ of Certiorari is granted is that the Circuit Court of Appeals for the Seventh Circuit erred in interpreting Section 4915 R.S. to mean that the District Court must have jurisdiction of all of the indispensable parties to the action

within six (6) months after the decision of the Board of Appeals.

Summary of Argument

I. The decision of the Circuit Court of Appeals is in conflict with the provisions of Sec. 4915 R.S.

II. The decision of the Seventh Circuit Court of Appeals conflicts with the holdings of other Circuit Courts of Appeals and of this Court on similar statutes of limitations.

III. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, decided by this Court.

IV. The importance of this case to American agriculture affords reason for the exercise of this Court's discretion to grant the Writ of Certiorari.

ARGUMENT

I. **The decision of the Circuit Court of Appeals is in conflict with the provisions of Sec. 4915 R.S.**

Sec. 4915 R.S. (35 U.S.C.A. Sec. 63), so far as here pertinent, reads as follows:

Sec. 4915 requires that bill in equity be filed within 6 months of Board's decision.

> "*Bill in Equity to Obtain Patent.* Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this sec-

> tion, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law . . ."

The question in this case turns upon the interpretation of that portion of the statute which states that the applicant "may have remedy by bill in equity if filed within six (6) months after such refusal or decision; and the Court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge . . ."

Section 4915 was enacted in 1870. The statement of this Court in *Case v. Los Angeles Lumber Products Company,* 308 U.S. 106, 115; 60 S.Ct. 1, 7; 84 L.Ed. 110, furnishes a guide to the interpretation of Sec. 4915. "Where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. Keck v. United States, 172 U.S. 434, 446, 19 S.Ct. 254, 258, 43 L.Ed. 505."

It would therefore be well to consider the meaning given to the phrase "bill in equity" at the time this section was enacted.

Bill in equity is equivalent to complaint.

The filing of a bill in equity as called for by Sec. 4915 is exactly equivalent to the filing of a complaint in a common law action.

Rule 3, Federal Rules of Civil Procedure, reads as follows:

> *"Commencement of Action.* A civil action is commenced by filing a complaint with the Court."

In Edmunds' Federal Rules of Civil Procedure (1938) appears the following annotation, note 4 to Rule 3:

> *"Rule grounded in equity procedure.* Former Federal Equity Rule 12 provided that whenever a bill was filed, and not before, the clerk should issue the process. This was in accordance with settled principles of equity practice, and the corresponding method prescribed by above Rule for commencing suit is the classic way of initiating suits in equity. Thus, in Daniell's Chancery Pleading and Practice (6th Am.Ed.), 2, it is said: 'A suit on the equity side of a court of chancery, on behalf of a subject, is ordinarily commenced by preparing a petition, containing a statement of the plaintiff's case, and praying the relief which he considers himself entitled to receive.'
>
> "In Farmers' Loan & Trust Co. v. Lake Street Elev. R. Co., 177 U.S. 51, 44 L.Ed. 667, 20 S.Ct. 564 (1900), the court said, citing Story's Equity Pleading: 'A suit in equity is commenced by filing a bill of complaint.' In Humane Bit Co. v. Barnet (C.C. N.J. 1902), 117 Fed. 316, it was stated that, in England, suits in equity have always been instituted by preferring a bill in the style of a petition, directed to the lord chancellor or other proper person, it being provided by statute that no process shall issue until after the suit has been so begun, and that in the United States the filing of the bill is the commencement of the suit . . ."

Note 7 to Rule 3, idem, in part, reads as follows:

Filing the complaint does not confer jurisdiction upon the court.

"*7. Filing does not confer jurisdiction.* Will merely filing the complaint confer jurisdiction upon the court, irrespective of the issuance and service of process? In dealing with equity cases the federal courts have heretofore indicated to the contrary.

" . . . In Wheeler v. Walton & Whann Co. (C.C. Del. 1895), 65 Fed. 720, the court said: 'Service of process is always requisite and until the subpoena has been served on the defendant, jurisdiction is not complete, either of the parties or of the property.'

* * *

"And in Equitable Life Ins. Ass. Soc. v. Schwartz, (C.C.A. 5th, 1930), 42 F. (2d) 646, the court said: 'A suit in equity is commenced when the bill is filed and process is issued where the process is subsequently served'."

District Court need not have acquired jurisdiction within 6 months.

Hence it will be seen that Sec. 4915 does not intend that the Court shall have acquired jurisdiction over the parties or the cause of action within the six (6) months period, but only that the complaint in the action must have been filed within that time.

The petitioner respectfully submits that the Court of Appeals therefore erred in interpreting Sec. 4915 to mean that all of the indispensable parties to an action under that Section must have been brought *within the jurisdiction* of the Court within six (6) months of the decision of the Board of Patent Appeals upon the interference.

II. **In overlooking the fact that the action in this case had been commenced within the statutory period, the opinion of the Circuit Court in the case at bar comes**

into direct conflict with a long line of decisions of other Circuit Courts of Appeals on similar statutes of limitations.

Other Circuit Courts of Appeals have held that a statute of limitations is tolled if complaint is filed within time limit.

In the interests of brevity only a few of these, most nearly parallel to the situation here presented, are cited below.

Port v. Litolff, 103 F. 2d 302 was an action for personal injuries under the Merchant Marine Act of 1920, which provides that "no action shall be maintained under this chapter unless *commenced* within two years from the day the cause of action accrued." (Emphasis supplied.) The complaint was filed on the last day of the period of limitations. The defendant was not served *until three (3) days later.* In holding that the action had not been barred, the court said (p. 303):

> "We have heretofore held that where a suit is filed, in good faith, within the period of limitation, it is commenced on the day of filing, if service is made within a reasonable time thereafter. Equitable Life Assur. Soc. v. Schwartz, 5 Cir., 42 F. 2d 646; U.S. v. Adams, 5 Cir., 92 F. 2d 395."

The Circuit Court of Appeals for the Ninth Circuit went even farther in its holding in *United Verde Extension Mining Co. v. Koso,* 273 F. 369. The complaint contained two counts, one based on the Employers' Liability Law of Arizona, the other upon the Common Law of that state. Defendants entered demurrers. A few days before trial, *after the limitation period had run,* plaintiff elected, by order of the court, to proceed under the Employers' Liability Act, and dismissed the other cause of action. Defendant took exception to this. In holding that the action had not been barred by the two (2) year

limitation of the Employers' Liability Act, the Court said (P. 374):

> ". . . As the cause of action in the present instance accrued in December, 1917, and trial was not had until March, 1920, we are asked to hold that the limitation of the statute has been rendered ineffectual.
>
> "We cannot agree with that position. Plaintiff below, having commenced his action within two (2) years after the cause accrued, ought not to be denied a right to proceed with it merely because the court delayed ruling upon the demurrers or failed to make an order of election until more than two years passed after the accrual."

In *Armstrong Cork Co. v. Merchants' Refrigerating Co.,* 184 F. 199, the Circuit Court of Appeals for the Eighth Circuit set forth the rule as to suits in equity (P. 206):

> ". . . In the federal courts . . . *the modern and the wiser rule now prevails that a suit in equity is commenced by the filing of the bill with the bona fide intention to prosecute the suit diligently,* provided there is no detrimental or unreasonable delay in the issue or the service of the subpoena. Farmers' Loan & Trust Co. v. Lake Street R.R. Co., 177 U.S. 51, 60, 20 S.Ct. 564, 44 L.Ed. 667; Humane Bit Co. v. Barnet (C.C.) 117 Fed. 316." (Emphasis supplied.)

This Court holds that plaintiff may amend complaint materially after limitation period.

The full scope of the rule that filing the complaint within the prescribed time will toll the statute is indicated by *Missouri, Kansas and Texas Railroad Company v. Wulf,* 226 U.S. 570, 33 S.Ct. 135, 57 L.Ed. 355, where this Court held that *even after the statute of limitation had run* the complaint might be amended to permit the plaintiff to sue in a new capacity and under a new statute.

The plaintiff had commenced the action under a Kansas statute to recover damages for the death of her son occurring while the latter was in the defendant's employ. She filed the complaint originally in her individual capacity as next of kin to the deceased. Later she was appointed administratrix of his estate. *More than two (2) years after the son's death* she amended her complaint to sue in the capacity of administratrix as well as in her original capacity, and also to bring the action under the Federal Employers' Liability Act. The Federal Statute barred such actions after two (2) years from the date of death. This Court, in holding that the action could still be maintained under the amended complaint, said (33 S.Ct. at 137):

> "Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Par. 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co., 168 U.S. 445, 42 L.Ed. 537, 18 S.Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore, it related back to the beginning of the suit. Texas & P.R. Co. v. Cox, 145 U.S. 593, 603, 36 L.Ed. 829, 832, 12 Sup. Ct. Rep. 905; Atlantic & P.R. Co. v. Laird, 164 U.S. 393, 395, 41 L.Ed. 485, 486, 17 Sup. Ct. Rep. 120. See also McDonald v. Nebraska, 41 C.C.A. 278, 101 Fed. 171, 177, 178; Patillo v. Allen-West Commission Co., 65 C.C.A. 508, 131 Fed. 680; Reardon v. Balaklala Consol. Copper Co. 193 Fed. 189."

It is therefore clear that the Circuit Court was in error when it held, in this case, that Tower must have been made a defendant to the action, so as to bring him within the jurisdiction of the District Court, within the six (6) months period provided by Sec. 4915, and that failure to do so was fatal to the petitioner's suit.

III. **The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, decided by this Court.**

In its opinion, the Court said (R. p. 529):

> ". . . Tower was denied the right after he had been made a party to answer the original complaint and consequently was deprived of a trial in a cause to which he was an indispensable party."

The question of due process of law, which is incident to a determination of the main question in this case, has been decided against the petitioner in the above quoted language.

Does the denial of Tower's motion deprive him of due process of law? There seems to be no case decided in the Federal Courts which is squarely in point upon this issue. It is believed, however, that recourse to certain well settled principles will resolve the question in petitioner's favor.

"Due process" defined.

Due process of law has been defined by this court in *Pennoyer v. Neff*, 95 U.S. 714, 744, 24 L.Ed. 565, 572, as:

> ". . . A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Applying the tests provided by this definition of Due Process of Law to the facts in this case, there has been:

There has been a competent tribunal.

(1) A competent tribunal, namely the District Court, empowered to hear causes of this nature by Sec. 4915.

Tower's general appearance gave District Court jurisdiction over him.

(2) The defendant Tower has been brought before the Court by his voluntary appearance. In making a general appearance without pleading to the jurisdiction of the court over his person, Tower waived the question of jurisdiction under Rule 12(h) of the Federal Rules of Civil Procedure, which states that "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . ." (with certain exceptions not here pertinent.)

In *Maxwell v. Stewart,* 89 U.S. 77, 80; 22 Wall. 77, 80; 22 L.Ed. 564, 565, this Court said:

> "The record shows that the action was commenced by attachment and service had by publication. So far the action was in the nature of a proceeding *in rem,* and would bind only the property attached. But afterwards, as the record also shows, *the defendant voluntarily appeared and submitted himself to the jurisdiction of the court.* He at first filed a demurrer, then an answer, and finally went to trial upon the issues made by the pleadings. After judgment he moved for a new trial which was overruled. If these statements appearing in the record are true, the court did have jurisdiction of the person of the defendant, and could bind him by a judgment." (Emphasis supplied.)

Tower was properly before the Court, since he voluntarily submitted to its jurisdiction.

Tower has had a full trial on the merits.

(3) The third test laid down by *Pennoyer v. Neff* is that there must have been a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In its findings upon Tower's motion to file an answer to the original complaint, the District Court said (R. p. 467):

> "An examination of said proposed answer demonstrates that said defendant Tower desires to have a trial not only upon the issues heretofore passed on by the court, but also various other issues which the said Tower could have raised at the trial in behalf of his client, Roach, but which he failed to do."

While there seems to be no Federal case which expressly supports this position in an exactly parallel situation, the rule is well established that a judgment upon the merits in *one* suit is conclusive upon the parties and their privies in *another* suit as to all matters and defenses which were, or might have been raised in the first action. *Gould v. Evansville & Crawfordsville Railroad Co.,* 91 U.S. 526, 23 L.Ed. 416; *Grubb v. Public Utilities Commission of Ohio et al.,* 281 U.S. 470, 479; 50 S.Ct. 374, 378; 74 L.Ed. 972.

A fortiori, the defenses which Tower, as attorney for the defendant Roach, raised in the proceedings in the District Court, as well as those which he waived, must be binding upon him, since he stood in a relation of privity to Roach.

The petitioner respectfully submits, therefore, that as to Tower all of the requirements of due process of law have been met by the proceedings in this case.

IV. **The importance of this case to large numbers of farmers and to the entire electric fence industry affords reason for the exercise of this Court's discretion to grant the Writ of Certiorari.**

A vital farm industry is threatened with an invalid patent.

The farm industry now finds itself confronted with an invalid patent. Manufacturers, purchasers and users of the Klumb equipment have no protection against a host of infringement suits brought by Roach, Tower and their assignees, although the District Court has found that Klumb's prior invention would constitute a valid defense to every such action. Nevertheless, every defendant in such a suit would have to apprise himself of the existence and priority of Klumb's invention and be prepared to go to a lengthy trial on the merits, duplicating the proceedings already had in the District Court in this case. That the possibility of such a procedure is no idle threat appears from the fact that less than a dozen of the defendant Roach's controllers had been manufactured and sold between the time the device was developed, in 1936, and the date on which the injunction issued from the District Court, in July, 1943 (R. p. 225, 253), while the plaintiff Klumb's device is being manufactured and extensively sold, both nationally through Montgomery Ward & Co. and internationally through other agencies.

Some idea of the magnitude of the industry may be gained from figures released in 1942 by the Electric Fence Manufacturer's Association, 615 North Aberdeen Street, Chicago, Illinois. In 1940, alone, the latest year for which figures are available, 240,000 fence controllers were sold, and the industry marketed controllers and "such accessory items as are manufactured exclusively for electric fencing, valued at $3,800,000."

The situation is thus parallel to that presented by *De Forest Radio Company v. General Electric Company*, 283 U.S. 664, 51 S.Ct. 563, 75 L.Ed. 1339; *American Fruit Growers, Inc. v. Brogdex Co.*, 283 U.S. 1, 51 S.Ct. 328, 75 L.Ed. 801; *Altoona Publix Theaters, Inc. v. American Tri-Ergon Corp. et al.*, 294 U.S. 477, 55 S.Ct. 455, 79 L.Ed. 1005 in which this court granted Writs of Certiorari to review cases in which the sole questions were factual ones as to the validity of patents.

With the exception of one fairly large concern, the greatest portion of the electric fence manufacturing industry is located in the Seventh Circuit. The situation here is therefore similar to that in *Muncie Gear Works, Inc., et al. v. Outboard Marine & Mfg. Co. et al.*, 315 U.S. 759, 62 S.Ct. 865, 86 L.Ed. 1171, where the sole question on the appeal to this Court concerned the validity of patent claims to an anti-cavitation plate used on relatively large and fast outboard motors. The claims were alleged to be invalid because there had been public use and sale of the device more than two years before the idea was presented to the Patent Office. In stating its reason for granting the Writ of Certiorari this Court said (62 S.Ct. at 868, 315 U.S. at 765):

> "While there was no conflict of decision with respect to these claims, we granted certiorari in view of the questions presented and because the patent dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decisions, is unlikely. 314 U.S. 594, 62 S.Ct. 100, 86 L.Ed.—, Schriber Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 59 S.Ct. 8, 83 L.Ed. 34."

The Petitioner respectfully submits that the subject matter involved in this action cannot reasonably be con-

sidered as of lesser importance than a device used on speed boats; nor is the situation less critical to the industry than that in the *Muncie* case.

CONCLUSION

This is such a case as merits the consideration of this Court. It is urged that a Writ of Certiorari issue herein.

Respectfully submitted,

IRA MILTON JONES
Counsel for Petitioner
STANLEY G. KLUMB

Milwaukee, Wisconsin
January 21, 1946

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 771

STANLEY G. KLUMB,
Petitioner,

vs.

JOHN ROACH AND EDWIN B. H. TOWER, JR.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWIN B. H. TOWER, JR.,
Attorney for Respondents.

THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. The Court of Appeals, Seventh Circuit, decided October 26, 1945, on the appeal in the suit of *Klumb* v. *Roach and Tower*, 151 F. 2d 374, 67 USPQ 158, that the District Court never acquired jurisdiction to adjudicate the issue therein under Revised Statutes Sec. 4915 and render judgment thereon, for the reason that,

> Tower, a co-owner of the invention and application in interference and an indispensable party, was never made a party to the suit within six months after the decision in the interference, as required by R. S. 4915.

Revised Statutes, Sec. 4915 (U. S. C., title 35, sec. 63), by which jurisdiction is conferred upon the District Court

to adjudicate the issue in a suit brought thereunder provides:

> "Sec. 4915 R. S. (U. S. C., title 35, sec. 63). Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, *if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had,* may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts in the case may appear. * * *" (Italics supplied.)

The petitioner now offers, as his excuse for not making Tower a defendant in the suit within the time allowed therefor, that Tower was attorney for Roach in the interference in the Patent Office and *inadvertently* was not made a party to the suit.

Petition for Writ of Certiorari, page 2.

> "But because Tower had been the attorney for Roach during the proceedings in the case, both in the Patent Office and subsequently, he was *inadvertently* not made a party defendant to the action, Roach being the only defendant named in the complaint as originally filed." (Italics supplied.)

The petition states that the decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with decisions of the Circuit Courts of Appeal of other circuits and the Supreme Court of the United States on the question of jurisdiction under R. S. 4915.

But the following decisions show that its decision in the

present suit was in complete accord with the decisions in other circuits in construing and applying the law under R. S. 4915.

Circuit Court of Appeals, Third Circuit, *United States* v. *Washington Institute of Technology, Inc.*,
138 F. 2d 25; 58 USPQ 503, July 31, 1943.
47 F. Supp. 384, 55 USPQ 127, D. C. District Delaware, Sept. 8, 1942.

Circuit Court of Appeals, Second Circuit, *Nachod & United States Signal Co. Inc., et al.* v. *Automatic Signal Corp., et al.*
105 F. 2d 981, 983, July 31, 1939.

District Court, E. D. New York, *Solomon* v. *Schlicker*,
58 F. Supp. 444, Dec. 5, 1944.

District Court, D. Delaware, *Shell Development Company* v. *Universal Oil Products Co.*
61 F. Supp. 925, Aug. 7, 1945.
63 F. Supp. 476, on rehearing.

Court of Appeals, District of Columbia, *Robinson, et al.* v. *Wayne, et al.*
136 F. 2d 767, May 29, 1943.

United States Supreme Court, *Robinson, et al.* v. *Wayne, et al.*
Petition for writ of certiorari denied, 320 U. S. 764.
Rehearing denied, 320 U. S. 812.

Circuit Court of Appeals, Second Circuit, *Armstrong, et al.* v. *DeForest, et al.*,
13 F. 2d 438, July 12, 1926.

United States Supreme Court, *Armstrong, et al.* v. *DeForest, et al.*,
Petition for writ of certiorari denied, 273 U. S. 734.

These decisions in different circuits do not present any diversity of opinion upon the prerequisites to jurisdiction in a suit under R. S. 4915.

The petitioner admits, by the stipulation October 29, 1943, R. pp. 491-492, that he had knowledge, ever since the interference was declared, that Tower was a co-owner of the Roach invention and application in interference, but action was never taken to make Tower a party to the suit until after the trial before the District Court had been had and an opinion rendered in favor of petitioner.

The Revised Statutes Sec. 4915, that conferred jurisdiction upon the District Court, imposed upon Klumb, the plaintiff, the duty and obligation to make Tower a party to the suit before the statutory period expired.

Tower always remained as merely the attorney for Roach in defending the suit, and never made either a voluntary or a general appearance as a party to the suit.

II. The defendant, Tower, is a defendant in name only, and not in fact, not having been made a party to the suit by due process of law, nor having himself made either a voluntary or general appearance as a party to the suit.

The fact that Tower acted as attorney for Roach in the defense of the suit does not constitute either a voluntary or a general appearance as a party to the suit, otherwise, every attorney in defending a suit for a client would become a party thereto and be bound by the judgment therein.

Tower pleaded in the answer, section III, the failure of the complaint to comply with R. S. 4915 (Rec. page 6), and further, denied, in opposing the Klumb motion to reopen, the jurisdiction of the District Court to enter judgment in the suit.

Tower opposed being made a party defendant by a supplemental complaint after the trial, and assigned as error in the statement of points on appeal R. p. 485, points 5, 39, 40, and 41, that he was so made a party defendant contrary to the statute.

The Roach patent had to be issued in the time provided by law, or otherwise, the application would have become abandoned and the right to a patent thereon would have been lost.

United States Gypsum Co., et al., v. *Masonite Corporation, et al.*

21 F. Supp. 551, 552, (D. C. D. Del., Dec. 7, 1937.)

"* * * (2, 3) This court is without jurisdiction to restrain the Commissioner of Patents from issuing a patent upon the Mason application. The Commissioner of Patents is an agent of an executive branch of the government and his duties are prescribed by statute. 35 U. S. C. A. sec. 6. The real relief here sought is to enjoin the Masonite Corporation from paying the final fee after allowance of the Mason patent. Restraining defendants from paying the final fee is in effect restraining the Commissioner of Patents from issuing the patent. In other words, plaintiff is seeking indirectly to accomplish what it admits it cannot accomplish directly. If the Mason patent is allowed, the payment of the final fee is a legal right with which this court cannot interfere. Upon the payment of the final fee, the Commissioner is bound by statute to issue the patent. 35 U. S. C. A. sec. 41. * * *"

III. The decisions cited in the petition and argument for a writ of certiorari, do not appear to have any applicability to the question decided by the Circuit Court of Appeals on jurisdiction under R. S. 4915 in the present suit, nor any applicability to granting a writ of certiorari under the circumstances shown by the record.

The decisions, cited in the petition, which the Supreme Court of the United States reviewed on the question of validity and infringement of patents, did not involve a question of jurisdiction under R. S. 4915.

The decisions, cited in the petition, which involved the application of a statute of limitations as a defense, did not involve a question of statutory jurisdiction under R. S. 4915.

The statute of limitations is a personal defense that may be waived by the defendant, but a Court cannot confer jurisdiction upon itself of its own volition or by acquiescence of the parties.

The Courts in different circuits have not been in conflict in requiring as a prerequisite to ~~its~~ jurisdiction in suits under R. S. 4915 that the complaint be filed and adverse parties be made parties thereto within six months from the decision in the interference.

The statutory requirements in R. S. 4915 are jurisdictional and cannot be waived by voluntary or general appearance or otherwise after the prescribed time to file the complaint has passed.

Shell Development Co. v. *Universal Oil Products Co.*, 63 F. Supp. 476 (D. C. Dela., Dec. 4, 1945).

IV. The petition feigns that the electric fence industry has been localized and concentrated in the Seventh Circuit, and that the Roach patent in suit would dominate the electric fence industry.

The record on appeal shows the fact to be that the electric fence industry is distributed far and wide from the Seventh Circuit.

Among those engaged in the electric fence industry, who were parties to the interference, in addition to Roach and Klumb, as it was declared, were:

Edwin J. Parker,
Spencerport,
New York.

Alger Seltz,
R. F. D. #2, Box 155,
Harbor Beach, Michigan.
(Rec. page 503.)

The Thomas' Register of American Manufacturers, 1944, lists the following electric fence manufacturers outside the Seventh Circuit:

Richards' Electro-Fence Co.
Payette, Idaho.

Electric Fence Co., Inc.,
Indianapolis, Ind.

Fred Stein Laboratory,
Atchinson, Kansas.

Sparks-Withington Co.,
Jackson, Mich.

Landon P. Smith, Inc.,
Irvington, N. J.

Hartman Electric Mfg. Co.,
Mansfield, Ohio.

W. Haddon Judson Mfg. Co.,
Ardmore, Pa.

The record on appeal further shows the fact to be that different types of electric fence controllers, not under the Roach patent in suit, are made and sold in the electric fence industry, among which are the Gengler-~~Prince~~ PRIME Controller and the Klumb Controller. (Exhibit 5, R. p. 269, Q. 134.)

V. The respondents submit that the petition for a writ of certiorari should be denied, for the reasons that:

The decision of the Circuit Court of Appeals for the Seventh Circuit is not in conflict with decisions of the Courts of Appeal of other circuits, or of the Supreme Court of the United States on the question of jurisdiction under Revised Statutes, Sec. 4915.

The question decided by the Court of Appeals concerns only the parties to the suit, and does not concern the public at large, and it does not involve a matter of great or momentous importance to the public.

The subject matter in suit does not in any way dominate the electric fence industry.

The electric fence industry, as is shown by the record, is not localized and concentrated in the Seventh Circuit.

The statements made in petition and argument about the electric fence industry are not substantiated.

Respectfully submitted,

EDWIN B. H. TOWER, JR.,
Attorney for Respondents.

Milwaukee, Wisconsin,
February 7, 1946.

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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NO. 771

STANLEY G. KLUMB,

Petitioner,

vs.

JOHN ROACH AND EDWIN B. H. TOWER, JR.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents' Brief raises no valid argument against Petitioner's position. Hence, it is not the purpose of the Petitioner, in filing this Reply Brief, to burden this Honorable Court by refuting at length the several arguments presented in Respondents' Brief in Opposition.

It is believed, however, that a consideration of certain of Respondents' arguments will better enable this court to estimate the importance of this case, both in relation to its significance in the interpretation of Section 4915 R.S. (U.S.C. Title 35, Sec. 63) and from the standpoint of its effect upon the electric fence industry.

I.

The decision of the Circuit Court of Appeals for the Seventh Circuit results in a confused interpretation of Section 4915 which can be corrected only by a decision of this Court.

As the Petitioner's brief has already amply demonstrated, Sec. 4915 requires only that the bill be filed within six months of the decision of the Board of Patent Appeals. That this is the plain import of the statutory language is evident when the pertinent portion thereof is considered, even as it has been italicized in the Respondents' Brief (Page 2):

> " * * * May have remedy by bill in equity, *if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had,* may adjudge * * * ."

Yet the Respondents contend (Respondents' Brief page 4) that:

> "The Revised Statutes Sec. 4915, that conferred jurisdiction upon the District Court, imposed upon Klumb, the plaintiff, the duty and obligation to make Tower a party to the suit before the statutory period expired."

This contention is the substance of the decision of the Circuit Court of Appeals for the Seventh Circuit.

The Respondents also cite, (Page 6 of Respondents' Brief), the recent case of *Shell Development Company v. Universal Oil Products Co.*, 63 F. Supp. 476, to this general effect. The Petitioner submits that the decisions in both the Shell case and the case at bar are the result of the misapplication of certain dicta to be found in the line of cases cited on Page 3 of Respondents' Brief. A brief analysis of these cases, taken in chronological order,

will readily demonstrate that there runs through them a line of dicta, resting upon an incorrect interpretation of the statute, which has been progressively distorted in order to arrive at these decisions.

> *Armstrong et al v. DeForest et al,* 13 F. 2d 438. Cert. den. 273 U.S. 734, 47 S.Ct. 243, 71 L. Ed. 865.

The Armstrong case holds only that an assignee of the inventor is an indispensable party to an action under Sec. 4915.

The case is, therefore, not in point since it is conceded that Tower is an indispensable party to this action.

> *Nachod & United States Signal Co., Inc., et al. v. Automatic Signal Corp., et al,* 105 F. 2d 981.

It is in the Nachod case, decided by the Circuit Court of Appeals for the Second Circuit, in 1939, that language first appears which may be interpreted to mean that the District Court must have acquired jurisdiction of all of the necessary parties to the action within six months.

In that case one of the defendants, a corporation, was domiciled outside the jurisdiction of the District Court and it, therefore, succeeded in having the case dismissed as against itself on this ground. The other defendant thereupon moved for dismissal on the ground that an indispensable party was not in the action.

In discussing the procedure which the plaintiff *might have* followed, the court made the following statement (P. 982):

> "* * * If the plaintiff had chosen to avail itself of the privilege granted by Title 35 U.S.C.A. Sec. 72a, it could have obtained jurisdiction over both

> the inventor and the licensee before the six months' statute of limitations created by Section 4915 had run."

Further on (P. 983), the court went on to use the language quoted in the decision of the case at bar by the Circuit Court of Appeals for the Seventh Circuit, (Opinion P. 13, 151 F. 2d at 380):

> "A hardship may arise in a case where a plaintiff suing under Section 4915 does not know of the existence of an exclusive license and therefore makes only the inventor a party-defendant for, as a result, his bill may be dismissed after it is too late to bring suit in the District of Columbia."
>
> *United States v. Washington Institute of Technology, Inc.*, 47 F. Supp. 384; 138 F. 2d 25.

In the Washington Institute case the plaintiff had neglected to join the inventor-assignor, an indispensable party, residing in another jurisdiction. In dismissing the action upon the defendant's motion, the District Court for the District of Delaware said (47 F. Supp. at 386):

> "* * * although the limitations have run on instituting an action in the District of Columbia court, under the facts of the case at bar, it cannot be said that the hardship was of defendant's making."

The court also cited with approval the second of the two quotations from the Nachod case set forth above. The decision was affirmed by the Circuit Court of Appeals of the Third Circuit, 138 F. 2d 25.

> *Robinson et al v. Wayne et al,* 136 F. 2d 767; Cert. den. 64 S.Ct. 63; 320 U.S. 764; reh. den. 64 S.Ct. 156, 320 U.S. 812.

The question in the Robinson case was whether certain parties who had been made defendants in the action

had sufficient adverse interests in the subject matter to warrant their being made defendants.

If they were not proper defendants in the suit, then the District Court of the District of Columbia had no jurisdiction of the case under Title 35 U.S.C. Sec. 72a, which grants that court jurisdiction in causes arising under Sec. 4915 when it appears that there are "adverse parties residing in a plurality of districts not embraced within the same state."

Concerning Sec. 72a the court said in the Robinson case:

> "Obviously, the purpose of the statute is to make jurisdiction dependent upon the situation which is revealed by the complaint."

The quoted language was cited by the Circuit Court of Appeals as applicable to the case at bar on the theory that the six months provision of Section 4915 R. S. was jurisdictional (Opinion, p. 7, 151 F. 2d at 377). The language quoted from the Robinson case, taken together with the dicta from the Nachod and Washington Institute cases quoted above, can conceivably lead to the conclusion which the Court of Appeals arrived at in the case at bar, provided the six months provision of Sec. 4915 *is* jurisdictional.

But Sec. 4915 cannot require that the complaint, i.e., the bill, show the necessary jurisdictional facts since the bill is not intended, of itself, to give the court jurisdiction of the case, as the Petitioner has already amply demonstrated.

Solomon v. Schlicker, 58 F. Supp. 444.

Again in the Solomon case an indispensable party had been left out of the action, and the case was dismissed upon the defendant's motion for this reason.

The dicta of the Nachod case set forth above was given a slight twist in the Solomon case when the court stated, again by way of dicta, that:

> " * * * in the six months limitation allowed the plaintiff in which to bring this suit * * * there remained ample time in which to obtain discovery as to an indispensable party in order to avoid the hardship which might result in the absence of such a party". (P. 445)

It is to be noted, however, that the plaintiff in the Solomon case was already out of court inasmuch as a proper motion for dismissal had been made and granted. It was then too late for him to commence another action against all of the necessary parties. Unless, therefore, the language quoted from that case is to be considered a misinterpretation of Section 4915 R.S., it can be read only as purely gratuitous advice to the plaintiff therein.

> *Shell Development Company v. Universal Oil Products Co.*, 61 F. Supp. 925; and on rehearing 63 F. Supp. 476.

The recent Shell case culminates the development which began with the Nachod case.

Again the plaintiff had neglected to bring certain indispensable parties into the action, among them Anglo Iranian Oil Co, Ltd. The defendant moved for dismissal. Anglo Iranian then purported to enter its voluntary appearance after the six months period had expired. In dismissing the action, the District Court for the District of Delaware based its decision upon the fact that other indispensable parties had not been brought into the action, but expressed doubt that a waiver by a party in a federal district court could cure a *jurisdictional* defect.

Thereafter the other parties, Standard Oil Development Company and Texaco Development Company, filed pleadings wherein both voluntarily appeared in the action, submitting themselves to the jurisdiction of the court and seeking to be made parties-defendant.

The plaintiff filed its petition for rehearing on the ground that by such voluntary appearances all indispensable parties had been brought into the action.

In its decision upon the motion for rehearing (63 F. Supp. 476) the court cited Klumb v. Roach, the case at bar, and denied the plaintiff's motion. The grounds for this denial were expressed in the following language:

> "If the requirements of the statute are jurisdictional (which they obviously are), voluntary appearances cannot cure a failure to comply with the statute."

The Petitioner respectfully submits that it is by no means obvious that the six months limitation of the statute is jurisdictional, except insofar as the time for *filing the bill* is concerned.

Thus, certain language in the Nachod case has been separated from its context and read upon a set of facts to which it was never meant to apply. By progressively warping the dicta of a line of subsequent decisions, the plain language of Section 4915 R. S. has been so completely distorted that a person reading the section for the first time could not arrive at the interpretation now placed upon it by the courts, and it remains for this Court to restore to Sec. 4915 the meaning intended by its framers.

II.

The Respondents' Brief in Opposition cites seven manufacturers of electrical fences who are purportedly outside of the Seventh Judicial Circuit. Actually, the Electric Fence Company, Inc. of Indianapolis, Indiana is within the Seventh Circuit as a glance at a map of the Circuit will readily show.

The other six manufacturers are of negligible importance in the field. Moreover, those of the listed manufacturers of electric fence equipment who are located outside the Seventh Circuit, and who actually manufacture fence controllers, produce a type of controller quite different in principle from the condenser discharge controller which forms the subject matter of this litigation.

The petitioner's position therefore remains unchallenged by Respondents. This case is of great importance to the electric fence industry, and that industry is so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of opinions, is unlikely.

Respectfully submitted,

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